No. 10058

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LILLIAN M. HOYT and EZRA S. HOYT, JR.,

Appellants,

vs.

SEARS, ROEBUCK AND CO., a corporation,

Appellee.

APPELLANTS' OPENING BRIEF

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Jurisdiction of the District Court and Jurisdiction of the Circuit Court of Appeals Upon This Appeal.

The plaintiff Sears, Roebuck and Co., a New York corporation, commenced an action against the defendants, residents of the State of California, by filing a complaint in the Superior Court of the State of California, in and for the County of Los Angeles [Trans. pp. 2-7], seeking to recover from the defendants the sum of $6,150.00, which the plaintiff had been forced to pay to the widow and minor child of one Henderson Hutchinson, deceased, by reason of a death benefit award made by the Industrial Accident Commission of the State of California, the death of the said Hutchinson having allegedly been caused by the negligence of the defendant Lillian M. Hoyt in the operation of a certain vehicle. The defendants Lillian M. Hoyt and Ezra S. Hoyt, Jr. filed an answer [Trans. pp. 7-10] and a cross-complaint [Trans. pp. 11-21] in the said Superior Court action,

wherein they sought to recover the sum of $25,000 in favor of the said Lillian M. Hoyt and the sum of $4,921.40 in favor of the said Ezra S. Hoyt, Jr. Thereafter, the plaintiff filed a petition for removal of the cause to the United States District Court [Trans. pp. 22-26], and a bond for removal [Trans. pp. 27-29].

The Superior Court of the State of California thereupon made an order removing said cause to the United States District Court [Trans. p. 31]. The plaintiff, Sears, Roebuck and Co. filed an answer to the cross-complaint [Trans. pp. 33-37] and the cause was tried before the court without a jury and judgment entered on November 13th, 1941 in favor of the plaintiff and cross-defendant and against the defendant Lillian M. Hoyt in the sum of $6,150.00, plus costs, and against the defendant Ezra S. Hoyt, Jr. in the sum of $5,000.00, plus costs [Trans. pp. 49-50]. The United States District Court found that the defendant Lillian M. Hoyt was guilty of negligence which was the sole proximate cause of the accident and that the decedent Hutchinson was guilty of *no negligence* [Trans. pp. 48-58].

Notice of appeal was served and filed on December 11th, 1941 [Trans. pp. 52-53].

Appellants earnestly contend that the United States District Court had no jurisdiction to hear this cause and that the judgment is void since the cause was improperly removed to the United States District Court from the Superior Court of the State of California, in and for the County of Los Angeles.

The Circuit Court of Appeals has jurisdiction upon appeal to review the judgment in question as provided by Section 71 of Title 28 of the United States Code and Section 225 of Title 28 of the United States Code.

Statement of the Case and Errors.

The plaintiff and appellee is a corporation, organized and existing pursuant to the laws of the State of New York. On or about the 13th day of May, 1940, said corporation was the employer of one Henderson Hutchinson. Plaintiff alleged in its complaint filed in the Superior Court of the State of California, in and for the County of Los Angeles [Trans. pp. 2-7], that on said 13th day of May, 1940, the said Henderson Hutchinson, while working within the course and scope of his employment for the plaintiff, was driving and operating a motor vehicle in a westerly direction on U. S. Highway 101, between the intersections of Santa Fe avenue and Alameda street and that at said time and place the defendant Lillian M. Hoyt so negligently operated, controlled and directed a Mercury automobile in an easterly direction upon said highway as to cause the same to collide with the automobile being driven by the said Henderson Hutchinson [Trans. pp. 2-4]. That the said Henderson Hutchinson was killed as a proximate result of the negligence of the said Lillian M. Hoyt. That thereafter the Industrial Accident Commission of the State of California made a death benefit award in the sum of $6,150.00 to the widow and minor child of the said Henderson Hutchinson, deceased, and that by reason of the foregoing the plaintiff was compelled to and did pay the said sum of $6,150.00. Plaintiff also alleged that on the said 13th day of May, 1940, the defendant Lillian M. Hoyt was driving and operating the said Mercury motor

vehicle with the consent and permission of its owner, Ezra S. Hoyt, Jr. [Tr. pp. 5-6].

The answer of the defendants Lillian M. Hoyt and Ezra S. Hoyt, Jr. denied all the material allegations of the plaintiff's complaint and set forth the defense of contributory negligence [Trans. pp. 7-10]. The defendants Lillian M. Hoyt and Ezra S. Hoyt, Jr. filed a cross-complaint wherein it was alleged that by reason of the negligence of the said Henderson Hutchinson, the said Lillian M. Hoyt sustained certain bodily injuries and the said Ezra S. Hoyt, Jr. sustained consequential damage as a result thereof [Trans. pp. 11-21]. Upon these pleadings, the case went to trial.

The evidence indicated that a collision occurred between a Packard automobile being driven in a westerly direction on U. S. Highway 101 by the decedent, Henderson Hutchinson and a Mercury automobile being driven in an easterly direction upon said U. S. Highway 101 by the defendant Lillian M. Hoyt. No eyewitnesses to the accident testified in person at the trial. Police Officer Danielson who investigated the accident after it had occurred, testified to his investigation.

The testimony of Lenton W. Finton and Francis H. Hoffman was read to the court by the plaintiff from a transcript of testimony taken before a Coroner's Jury at an Inquest held over the body of the said Henderson Hutchinson. On behalf of the defendants, it was shown that the defendant Lillian M. Hoyt had sustained serious and permanent bodily injuries and particularly an injury

to her brain resulting in a condition known as amnesia [Trans. pp. 99-101]. As a result, the defendant Lillian M. Hoyt had no recollection whatsoever of the facts pertaining to the accident or the events leading up to the accident or any fact or circumstance occurring after the accident and pertaining thereto and she did not testify at the trial with reference to the same. On behalf of the defendants, the testimony of Florence Hastings was read from the transcript of the Coroner's Inquest.

The testimony of the witness Lenton W. Finton revealed that the Packard automobile driven by the decedent was on its wrong side of the road at the time of the impact [Trans. p. 104]. The testimony of the witness Hoffman was not conclusive as to which vehicle was on its wrong side of the road, the statement being that the accident happened on the center line [Trans. p. 108].

The testimony of the witness Florence Hastings shows that the Packard driven by the decedent was on its wrong side of the road at the time of the impact [Trans. p. 114].

The evidence would indicate that immediately to the east of the point of impact, Highway 101 curves toward the north; that just prior to the impact, the defendant Lillian M. Hoyt proceeded from the right hand lane of traffic on the highway, in the direction in which she was proceeding, toward the center line of the highway. The police officer testified that after the impact, he found tire marks approximately 48 feet in length on the highway leading from the right lane of traffic to the rear wheels

of the Mercury automobile [Trans. p. 75] and that at the time he arrived at the scene of the accident, the front end of the Mercury automobile was three or four feet over the double white line [Trans. p. 95]. The evidence indicated that the highway at the point of impact was a four lane highway—two lanes for eastbound traffic and two lanes for westbound traffic. In the center of the highway and separating the two sides was a painted double white line [Trans. pp. 95; 73]. A single painted white line separated the edge of the highway from the center line, thus dividing the highway into four lanes.

As has already been shown in the statement with reference to the jurisdiction of the Circuit Court of Appeals, this cause was originally commenced by a foreign corporation in the Superior Court of the State of California, in and for the County of Los Angeles. The cause was thereafter removed by said foreign corporation to the United States District Court upon the filing of a cross-complaint against said non-resident plaintiff, by the defendants who are residents of the State of California.

The questions then of the jurisdiction of the United States District Court, the sufficiency of the evidence to support the findings of fact, conclusions of law and judgment of the United States District Court, and whether or not the United States District Court correctly applied the law with reference to the presumption which existed in favor of the defendant Lillian M. Hoyt, a victim of amnesia, that she used ordinary care for her own con-

cerns, are the points which have been raised on this appeal and are the points upon which appellants intend to rely and which are as follows:

1. Under the rule announced in the case of *Shamrock Oil and Gas Corporation v. Sheets,* 313 U. S. 100, the United States District Court had no jurisdiction to render any judgment in this cause and the judgment is void.

2. The appellee being a foreign corporation and having commenced this action as original plaintiff in the Superior Court of the State of California, in and for the County of Los Angeles, improperly removed the said suit to the District Court of the United States contrary to the removal statutes and any judgment rendered by the United States District Court was, under the circumstances, in excess of its jurisdiction and void and this Court should *sua sponte,* reverse the judgment and remand the case to the Superior Court of the State of California, in and for the County of Los Angeles for further proceedings.

3. The evidence is insufficient to support the Findings of Fact and Conclusions of Law and Judgment rendered in pursuance thereof.

4. The United States District Court erred in failing to give to appellant Lillian M. Hoyt the full benefit of the presumption that a person uses ordinary care for his own safety and concern.

ARGUMENT.

I.

The Plaintiff Being a Foreign Corporation and Having Commenced This Action as Original Plaintiff in the Superior Court of the State of California, in and for the County of Los Angeles, Improperly Removed the Said Cause to the United States District Court, Contrary to the Removal Statutes, and the Judgment Rendered by the United States District Court Was, Under the Circumstances, in Excess of Its Jurisdiction and Void and This Court Should Sua Sponte Reverse the Judgment and Remand the Case to the Superior Court, for Further Proceedings.

Under this point, appellants will cover the first two points which are set forth in the Statement of Points on Appeal.

Plaintiff commenced this action in the Superior Court of the State of California, in and for the County of Los Angeles by filing a complaint [Trans. p. 2]. It was alleged in the complaint that the plaintiff was a corporation, organized and existing under and by virtue of the laws of the State of New York [Trans. p. 2]. Thereafter an answer and cross-complaint were filed by the defendants [Trans. pp. 7-20] and the plaintiff thereupon filed a petition for a removal of the cause to the United States District Court, wherein it was alleged that the plaintiff and the defendants were citizens of different states and that the amount prayed for in the complaint was $6,150.00

[Trans. pp. 22-23]; that the amount prayed for in the cross-complaint of Lillian M. Hoyt was the sum of $25,000.00 and the amount prayed for by the said Ezra S. Hoyt, Jr. was the sum of $4,921.40 [Trans. pp. 23-24].

In the case of *Shamrock Oil and Gas Corp. v. Sheets,* 313 U. S. 100; 85 L. Ed. 1214; 61 Sup. Ct. 868, the United States Supreme Court finally laid to rest the question whether or not a non-resident plaintiff who submitted itself to the jurisdiction of the state court was thereafter entitled to remove the cause to the United States District Court upon the filing of a counter-claim or cross-complaint by the defendant in the action, and the court held that the non-resident plaintiff, *having submitted itself to the jurisdiction of the state court,* was not entitled to remove the cause to the United States District Court.

The United States Supreme Court states as follows:

> "In West v. Aurora, 6 Wall. (U. S.) 139, 18 L. ed. 819, this Court held that removal of a cause from a state to a federal court could be effected under section 12 only by a defendant against whom the suit is brought by process served upon him. Consequently a non-citizen plaintiff in the state court, against whom the citizen-defendant had asserted in the suit a claim by way of counterclaim which, under state law, had the character of an original suit, was not entitled to remove the cause. The Court ruled that the plaintiff, having submitted himself to the jurisdiction of the state court, was not entitled to

> avail himself of a right of removal conferred only on a defendant who has not submitted himself to the jurisdiction."

The court traces the history of the removal statute and concludes that Congress, in enacting the present statute of 1887 did not intend to change the rule which had been set forth in the case of *West v. Aurora, supra.*

The court very significantly points out:

> "Not only does the language of the Act of 1887 evidence the congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' (Citing cases.)" (313 U. S. 100 at 107-109; 85 L. ed. 1214, at 1219.)

The plaintiff in the case at bar falls squarely within the rule announced by the Supreme Court in the *Shamrock* case. It was never the intention of Congress to allow a non-resident plaintiff who had voluntarily submitted to the forum of the State of California, to remove the cause to the United States District Court upon the filing of a cross-complaint in the action.

II.

There Is No Substantial Evidence to Support the Findings of Fact, Conclusions of Law and Judgment Entered in Pursuance Thereof.

In order to present this point, it will be necessary for appellants to refer to the testimony of the various witnesses introduced at the trial. Before doing so, however, appellants desire to point out several factors which they believe are of vital significance.

1. The testimony indicates, without conflict, that the defendant Lillian M. Hoyt sustained a brain injury in the accident, resulting in an amnesia, or total loss of memory concerning the accident and the events leading up thereto.

Dr. Dorrell G. Dickerson testified that the defendant Lillian M. Hoyt was suffering from *amnesia* [Trans. p. 100].

Plaintiff's witness Dr. W. W. Horst testified that the usual effect of a blow to the head was to *blot out the memory* [Trans. p. 67].

The defendant Lillian M. Hoyt testified that she had no recollection at the present time of the accident or what she had been doing prior to the accident [Trans. pp. 121-122]. She testified further that she did not remember the day of the accident at all.

It is settled law in California that where a person has sustained an injury which results in a loss of memory concerning the facts or circumstances surrounding an accident, that person is entitled to the benefit of the presumption that he has exercised reasonable and ordinary care for his own safety and concerns. *Hoppe v. Bradshaw,* 42 Cal. App. (2d) 334, 108 P. (2d) 947 (1941); *Scott v. Sheedy,* 39 Cal. App. (2d) 96, 102 P. (2d) 575.

2. The accident occurred on a highway which, at the point of impact, ran in an easterly and westerly direction but immediately to the east of the point of impact the highway curved toward the north [Trans. p. 83].

3. The *plaintiff's* counsel introduced into evidence the testimony of two eye-witnesses, Lenton W. Finton and Francis H. Hoffman, whose testimony is *wholly irreconcilable* with any presumption that the decedent exercised ordinary care for his own concerns.

These witnesses did not testify personally at the trial but their testimony as given at the Coroner's Inquest upon the body of the decedent was read into evidence by plaintiff's counsel.

With these preliminary observations in mind a review of the testimony reveals that the witness Lenton W. Finton testified, in part, as follows:

> "Q. Then which car was on the wrong side of the highway, that is on the wrong side of the center line? A. *The Packard* when they got stopped, the Mercury was setting on that white line, or practically over it, but as near as I could tell from watching, *she did not go across that double white line.*" (Italics added.) [Trans. p. 104.]
>
> "Q. *And at the time of the impact, the Mercury was definitely south of the center white line?* A. *Yes, sir.*" (Italics added.) [Trans. p. 105.]

The witness Francis H. Hoffman whose testimony was read by plaintiff's counsel, testified as follows:

> "Q. Could you tell where the impact occurred in reference to the center line of the highway? A. I would say it was just about right where they were at, right on the center line." [Trans. p. 108.]

It might be pointed out that both the witness Finton and the witness Hoffman were traveling in an automobile behind the automobile driven by Lillian M. Hoyt, proceeding in an easterly direction on Highway 101 [Trans. pp. 102 and 109].

The only other eye-witness to the accident was Florence Hastings, whose testimony given at the Coroner's Inquest was read into the record by counsel for the defendants.

This witness was proceeding in a westerly direction on Highway 101 and was following the Packard automobile driven by the decedent [Trans. p. 113]. The witness Florence Hastings testified, in part, as follows:

> "Q. Could you tell where the impact occurred in reference to the center line of the highway? A. Well, the way it looked to me, *he was on the wrong side of the street.*
>
> Q. Could you tell how far over the center line of the street he was? A. Well, it looked like *he was astraddle of the two lines, the center.*" (Italics added.) [Trans. p. 114.]

This witness further testified that just prior to the impact the Packard automobile had passed another vehicle [Trans. p. 113]. In this connection the witness was asked the following question:

> "Q. Well, was it necessary for the Packard to straddle the center line in order to pass that car? A. No, I would not think so." [Trans. p. 115.]

Police Officer Danielson was not an eye-witness to the accident. This witness testified that there were approximately 48 feet of skid marks leading from the right hand or southerly side of the highway to the wheels of the Mercury automobile, the front end of which was located

approximately three to four feet over the double white line at the time the officer saw it [Trans. pp. 75; 95]. This witness also testified with reference to the physical damage which was done to the respective vehicles.

It is fundamental that the burden of proving negligence rests upon the plaintiff. The mere fact that an accident occurred would not impose liability upon the defendants. *Depons v. Ariss,* 182 Cal. 485, 188 P. 797. The court must also remember that *even assuming* decedent was entitled to the benefit of the presumption that he used ordinary care, this presumption cannot be used as *substantive evidence of negligence. Looney v. Metropolitan R. R. Co.,* 200 U. S. 480; 50 L. Ed. 564; *Southern R. R. Co. v. Stuart,* 115 Fed. (2d) 317.

The testimony of the eye-witnesses Finton, Hoffman and Hastings clearly demonstrates that *at no time prior to the impact was the automobile of the defendant Lillian M. Hoyt across the center line of the highway.*

Section 525 of the California Vehicle Code provides as follows:

> "(a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of, and as close as practicable to the right-hand curb or edge of, such roadway, except as follows:
>
> (1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement.
>
> (2) When placing a vehicle in a lawful position for, and when such vehicle is lawfully making, a left turn.

(3) When the right half of a roadway is closed to traffic while under construction or repair.

(4) Upon a roadway designated and signposted for one-way traffic.

(b) The State Department of Public Works shall by regulation determine a distinctive roadway marking which shall indicate no driving over such marking, and is authorized either by such marking or by signs and markings to designate any portion of a State highway where the volume of traffic or the vertical or other curvature of the roadway renders it hazardous to drive on the left side of such marking or signs and markings. When such marking or signs and markings are in place, the driver of a vehicle shall not drive to the left thereof."

The highway in question is a State highway and there is no dispute that in the center of said highway there was a double white line. Section 526 of the Vehicle Code of the State of California has reference to driving upon roadways lined with three or more clearly marked lanes. Subdivision (a) provides as follows:

"A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

From the evidence which has already been quoted to the court, it must be obvious that the decedent violated both of these provisions of the Vehicle Code.

Irrespective of what the evidence may show with reference to whether or not the decedent was in the act of passing another vehicle, the fact remains that the decedent was not upon his *right half* of the highway. A violation of these sections of the Vehicle Code, hereinabove set forth, *constitutes negligence as a matter of law.*

As the court says in *Olson v. Meacham,* 129 Cal. App. 670, 19 P. (2d) 527:

> "In this case, driving on the wrong side of the road when there was no necessity therefor constituted negligence."

In the case of *Surtleff v. Wyns,* 114 Cal. App. 653 at 655, 300 P. 890, the court says:

> ". . . The operation of the car on the left hand side of the highway itself constituted negligence *per se.*"

See also:

Blackwell v. American Film Co., 189 Cal. 689, 209 P. 999;

Sills v. Forbes, 33 Cal. App. (2d) 219, 91 P. (2d) 246.

Appellants are at a loss to understand by what legal legerdermain the United States District Court arrived at the conclusion that the defendant Lillian M. Hoyt was guilty of negligence which was the *sole* proximate cause of the accident. The uncontradicted testimony of three eye-witnesses indicates that the defendant was not, up to

and including the time of the impact, upon the wrong side of the highway, *i. e.,* to the north of the double white line. It is true that the witness Danielson testified that the Mercury was three or four feet over the while line *after* the accident. What mechanical forces were brought into play which threw the Mercury over the white line is something which appellants are in no position to answer. It would seem to appellants, however, that the critical inquiry would be the position of the cars *at the time of the impact.* There is no evidence in the record which would support an inference that the defendant Lillian M. Hoyt was upon the wrong side of the highway at the time of the impact. In fact all of the testimony is to the contrary.

As the California court has said in the case of *Hosking v. Danforth,* 1 Cal. App. (2d) 178, 36 P. (2d) 427:

> "Common experience and observation teach us that strange and astonishing things sometimes happen in the world of physical phenomena, and accidents sometimes appear to happen in manner unaccountable. For these reasons an appellate court must be careful not to give to dogmatic and undemonstrated conclusions respecting natural laws precedence over the testimony of apparently credible witnesses; * * *"

Appellants believe that the trial court has substituted *speculation* and *conjecture* for legitimate legal proof.

It must be kept in mind at all times that the decedent cannot be given the benefit of the presumption that he

exercised ordinary care for his own concerns, since the testimony introduced by the plaintiff, *i. e.,* the testimony of the witness Finton, is irreconcilable with any such presumption. This principle of law is aptly stated in the case of *Engstrom v. Auburn Auto Sales Corp.* 11 Cal. (2d) 64, 77 P. (2d) 1059, where the court says:

> "Generally speaking, however, it may be said that a presumption is dispelled when a fact which is wholly irreconcilable with it is proved by the uncontradicted testimony of the party relying on it or of *such party's own witness,* when such testimony was not the product of mistake or inadvertence."

With this in mind and with the testimony of the three eye-witnesses in mind, an apt subject of inquiry is, what caused the defendant's car to veer from the right side of the highway toward the center thereof, leaving 48 feet of skid marks?

People driving on a level highway do not suddenly veer over to the middle thereof, leaving skid marks for a distance of 48 feet unless there is some reason to do so. Appellants believe that the answer may perhaps be found in the testimony of the eye-witness Florence Hastings. Before quoting from the testimony of this witness, it is well to keep in mind that the decedent was *coming off the curve* which was immediately east of the point of impact and *was passing another vehicle just prior to the impact.*

The witness Hastings testified as follows:

"Q. How fast was the Packard traveling? A. Well, I would say 45 or 50 miles per hour." [Trans. p. 114.]

"Q. State what you saw in reference to the accident. A. Well, as I was back about two-tenths of a mile, right where the tracks cross State, the Packard went to pass another car, and he was over close to the double line in the street, and there is a curb, and as he went around the curve, the Mercury was coming from the opposite direction, and they went together, * * *." [Trans. pp. 113-114.]

"Q. Could you tell where the impact occurred in reference to the center line of the highway? A. Well, the way it looked to me, he was on the wrong side of the street.

Q. Could you tell how far over the center line of the street he was? A. Well, it looked like he was astraddle of the two lines, the center." [Trans p. 114.]

"Q. Well, the car that the Packard was passing, what part of the highway did that car occupy? A. Well, he was, I guess you would say in the second lane.

Q. Next to the center line? A. No, next to the shoulder.

Q. Well, was it necessary for the Packard to straddle the center line in order to pass that car? A. No, I would not think so." [Trans. p. 115.]

The testimony of this eye-witness would indicate therefore that the decedent, traveling at a speed of between 45 to 50 miles per hour was attempting to pass another car just after he had come off the curve and that prior

to the time of the impact, the Packard was on the wrong side of the double white line which was in the center of the highway. Bearing in mind that the defendant Lillian M. Hoyt is entitled to the benefit of the presumption that she exercised ordinary care for her own concerns, it must be apparent that the sudden veering of her car was probably brought about by her belief, and a justifiable one under the circumstances, that the driver of the Packard automobile was coming off the curve and over on to her side of the road. There is nothing else to explain this sudden veering which is consistent with the presumption to which the defendant is entitled.

For a case involving a consideration of what facts are sufficient to support a finding that the driver of a vehicle was not guilty of actionable negligence merely because of the happening of an accident, see the case of *Lake v. Churchill,* 20 Cal. App. (2d) 411, 67 P. (2d) 107.

It is respectfully submitted that there is no substantial evidence supporting the finding of the trial court that the defendant Lillian M. Hoyt was guilty of negligence which was the sole proximate cause of the accident. In this respect, it is also well to keep in mind that the finding of the court is not justified if it appears that the decedent was guilty of any negligence, *contributing in the slightest degree whatsoever,* to the happening of the accident. Under the undisputed testimony of the three eye-witnesses, it is difficult for appellants to understand how this Court can say that the decedent was not himself guilty of negligence as a matter of law, proximately contributing to the accident.

III.

The Court Erred in Failing to Give to Appellant Lillian M. Hoyt the Full Benefit of the Presumption That a Person Uses Ordinary Care for His Own Safety and Concern.

This point has been partially covered under Point II in this brief. Appellants have no way of knowing what thought processes were indulged in by the trial court in order to reach its decision in this case. From a review of the evidence, however, which has already been given, the following propositions occur to appellants:

1. The testimony of the eye-witnesses is undisputed to the effect that the appellant Lillian M. Hoyt was on her own side of the highway at the time of the impact.

2. The testimony of these same witnesses reveals that the decedent was upon his wrong side of the highway at the time of the impact.

3. The testimony clearly indicates that the decedent himself violated one or more provisions of the California Vehicle Code and that he was guilty of negligence as a matter of law, proximately contributing to the happening of the accident.

In the face of the foregoing, appellants do not believe that there was sufficient evidence of negligence presented as against the appellant Lillian M. Hoyt to have overcome the presumption that she was exercising ordinary care for her own concerns. Appellants contend that all of the evidence which was introduced was consistent with

the presumption that the defendant Lillian M. Hoyt exercised ordinary care. No evidence having been introduced, sufficient to overthrow this presumption, it is apparent that the trial court has not only erred in finding that the decedent was not guilty of any negligence proximately contributing to the accident, but has also failed to give to the defendant Lillian M. Hoyt the benefit of the presumption that she used ordinary care.

Conclusion.

From the foregoing, appellants believe that the conclusion is inescapable that the United States District Court had no jurisdiction to try the cause and that, in any event, the evidence was insufficient to sustain the judgment in favor of the plaintiff.

Respectfully submitted,

KENNETH J. MURPHY,
Attorney for Appellants.